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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1971

71 - 145

MILDRED A. PICKNEY, Personal Representative of Joe Pickney, Deceased, for herself and for DAVID R. PICKNEY, MRS. WALTER C. HAWKINS, and THOMAS E. PICKNEY, a minor, by his Guardian ad Litem, MILDRED A. PICKNEY,

Plaintiffs and Petitioners,

vs.

ORO DAM CONSTRUCTORS, a joint venture etc., et al.; and WESTERN PACIFIC RAILROAD COMPANY, a corporation,

Defendants and Respondents.

PETITION OF MILDRED A. PICKNEY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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1. PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

(a) Appended to this petition are:

(i) Judgment of the United States Court of Appeals for the 9th Circuit Affirming Dismissal of Plaintiff's Action in the United States District Court for the Eastern District of California.

(ii) Judgment of the United States District Court for the Eastern District of California, entered April 25, 1969, Dismissing Plaintiff's Action.

(iii) Order of U.S. District Court for the Eastern District of California filed Nov. 20, 1968, that Defendant Western Pacific Railroad Company's Motion to Abate or Dismiss be, and the same is, hereby denied.

(b) Pickney was employed at time of his death as a locomotive engineer for Oro Dam Constructors, contractors building Oroville Dam and providing common carrier rail service at the Dam for the State of California and others, but at the time of his death was not moving interstate freight.

Plaintiff, petitioner, claims that Oro Dam Constructors performed an operational activity for Western Pacific Railroad Company in moving all rail freight to and from said Dam over Western Pacific Railroad Company's right of way to the Dam subject to Interstate Commerce Commission control.

(i) The date of the Judgment of the United States Court of Appeals for

the Ninth Circuit sought to be reviewed is April 30, 1971. Said judgment was entered April 30, 1971.

(ii) The date of the Order Denying Rehearing was June 4, 1971.

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 45 U.S.C. 51.

(c) Whether Pickney at the time of his death was entitled to the protective provisions of 45 U.S.C. 51 as against Oro Dam Constructors and Western Pacific Railroad Co. or did Western Pacific Railroad Co.'s freight bills to Zephyr instead of the Dam and the tariffs under which said freight moved limit the protective provisions of F.E.L.A. so as to exclude railroad employees of Oro Dam Constructors.

(d) 45 U.S.C. 51 is as follows:

"§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the

surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

(e) A CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS (OR LEGAL CONCLUSIONS) MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED:

(1) CONTRACT TO RELOCATE WESTERN PACIFIC RAILROAD COMPANY'S RIGHT OF WAY LEFT PART OF RELOCATED RIGHT OF WAY TO THE DAM SUBJECT TO INTERSTATE COMMERCE COMMISSION CONTROL.

Contract dated June 28, 1957 between State of California and Western Pacific Railroad Company to relocate said railroad's main line right of way in the Feather River canyon (Pl.'s Exh. 1, R. 22, 27) was executed contingent upon Governmental Approval (page 35) of said contract.

That part of Western Pacific Railroad Company's main line running downstream from the Dam to Zephyr or the interchange tracks has, at all times before said contract was executed and since that time, remained a part of the Western Pacific Railroad Company's interstate line of tracks (pages 41-43 of said Exh.) subject to regulatory authority of the Interstate Commerce Commission, Pl.'s Exh. 12, R. 74, 75, Western Pacific's Application for Abandonment, Construction and Trackage Right Before the I.C.C., Pl.'s Exh. 14, R. 75, I.C.C. - Order.

(2) CONTRACT TO BUILD OROVILLE DAM AND PROVISION THERE-IN FOR COMMON CARRIER RAILROAD FREIGHT SERVICE TO DAM LOCATION.

Contract dated July 30, 1962 (Pl.'s Exh. 4, R. 41) between the State of California and the Oro Dam Constructors provided for Common Carrier Service by Railroad at the Dam site for the benefit of the State and all other suppliers of materials, including, but not limited to, the prime contracts let and to be let as listed on page 35 of said contract. Said contract under Section 17(j), pages 49 and 50, required Oro Dam Constructors to maintain and operate said railroad facility for the purpose of providing Common Carrier Railroad Service between Zephyr, the interchange tracks, and the Dam, or, if Oro Dam Constructors did not elect to provide said service then Western Pacific shall provide the same. Said interchange is 3.69 miles downstream from the Dam, as shown by Western Pacific's "Consolidated Application for Abandonment, Construction and Trackage Rights" filed with the Interstate Commerce Commission (Pl.'s Exh. 12, R. 74, 75) on

page 4 therein. The interchange tracks began a few hundred feet downstream of the tunnel entrance where the head-on collision occurred killing Pickney and three others (R. 95, lines 20-23).

(3) ZEPHYR, INTERCHANGE TRACKS, WHERE FREIGHT CARS WERE INTERCHANGED BETWEEN ORO DAM CONSTRUCTORS' RAILROAD AND WESTERN PACIFIC, FROM THE LATTER'S CONNECTING RE-LOCATED MAIN LINE.

Aside from being a connection between Western Pacific's old main line and its re-located line beginning in Western Pacific's freight yard at Oroville, it is best described by Mr. Greves, attorney for defendants, in his opening statement (R. 14, line 17 to end of paragraph):

"... between Zephyr and the damsite there are no members of the public who could ask for or receive common carrier service by rail because there is nobody that lives there; there is no industry located in there. This is a canyon and it's uninhabited. Even when Western Pacific Railroad was running its line in through there, there was no shipper to be served in this area, between Zephyr and what ultimately became the dam location, because there was no one in there." Only contract suppliers for the construction projects, including Oro Dam Constructors, would need Common Carrier Service at the Dam.

(4) FREIGHT BILLS ISSUED BY WESTERN PACIFIC FOR FREIGHT CAR CONSIGNMENTS TO ZEPHYR FOR MOVEMENT BY ORO DAM CONSTRUCTORS' RAILROAD TO THE DAM AND SAID DEFENDANT'S ADMISSIONS AS TO CONTINUED MOVEMENTS OF SAID FREIGHT CARS.

(A) Freight Bills:

The 79 Western Pacific freight bills included in Pl.'s Exh. 8, R. 59, 60, 68, show 74 interstate car shipments to Oro Dam Constructors' railroad at Zephyr and 5 intrastate car shipments set out at Zephyr.

Said 79 freight bills, without plaintiff's request, were assembled, photo-copied and handed to plaintiff's attorney by Ray Leonard, one of the attorneys for the defendants, as freight bills noted from the 1964 and 1965 demurrage records of Western Pacific at its Oroville freight station (R. 59, lines 22-23).

At this same time, without prior request, plaintiff's attorney delivered to Mr. Leonard a copy of the tariffs which make up Pl.'s Exh. 9, R. 61, 68.

Plaintiff's attorney was then permitted to look at the demurrage books for 1964 and 1965 from which notes were taken and used as the bases for the request for admissions filed by plaintiff on Feb. 4, 1969. Each defendant filed separate admissions thereto on February 26, 1969, as broken down under (B) below.

The 74 out-of-state car shipments to Zephyr show:

27 cars consigned to McDowell Wellman or McDowell Wellman Engineering Co. of which 7 were consigned to said Company or Companys % (in care of) O.D.C.

12 cars were consigned to McDowell or McDowell Co. of which 4 were consigned to either the individual or the

Company % O.D.C.

21 cars were consigned to Oro Dam Constructors.

1 car was consigned to O.D.C. % Claude Johnson.

5 cars were consigned to O.D.C. % Peterson Tractor or Peterson Tractor and Equipment Co.

3 cars were consigned to Peterson Tractor % O.D.C.

5 cars were consigned to Peterson Tractor or Peterson Tractor and Equipment Co.

(B) Western Pacific Railroad Co.'s Admissions filed Feb. 26, 1969 show:

82 freight cars were consigned to Zephyr with freight originating from out-of-state.

9 freight cars with consignments of freight originating within the State of California were set out at Zephyr.

4 freight cars were left at Zephyr siding by Oro Dam Constructors' railroad with consignments of freight for out-of-state destinations.

Oro Dam Constructors' Admissions filed Feb. 26, 1969 admit the movement of said freight cars from said siding to the Oroville Dam and at times to the "Borrow Area" from where the dirt fill for the Dam was taken.

All of said freight bills show

Zephyr, the interchange, as the beginning or ending point of all of said shipments. None of the shippers or consignees of said freight delivered or received their freight shipments at said point. All of said freight shipments were continued to, or started from Oroville Dam by Oro Dam Constructors' railroad operation or at times the "Borrow Area" from where the dirt fill for the Dam was taken.

(C) Differences Between Freight Bills and Western Pacific Admissions:

Although Western Pacific admits setting out 91 freight cars at Zephyr siding as shown by their two annual demurrage car record books for the two years of 1964 and 1965, yet they have provided plaintiff's attorney with only 79 freight bills for 79 freight cars set out at Zephyr as shown from said records. Since compiling said freight bills was a voluntary act on the part of Western Pacific Railroad Co., it seems likely the 12 omitted incoming freight cars bills and 4 interstate outgoing freight cars bills for the outgoing freight cars were better left omitted than explained by defendant. In any event, the only freight bills ever seen by plaintiff's attorney were the 79 making up Pl.'s Exh. 8, R. 59, 60, 68.

(5) CONTRACT BETWEEN CALIFORNIA AND WESTERN PACIFIC RAILROAD ALLOWED FOR ORO DAM CONSTRUCTORS TO USE WESTERN PACIFIC'S RIGHT OF WAY BETWEEN ZEPHYR AND THE DAM, AND MOVE COMMON CARRIER FREIGHT BETWEEN THE TWO POINTS.

Contract dated August 10, 1962, Pl.'s Exh. 2, R. 33, 34, between the State of California and Western Pacific Railroad

Company, supplemental to their contract of June 28, 1957, supra, provided in paragraph No. 1 on page 4 thereof, the purpose of said interchange, Zephyr siding, to be "... and further agrees that thereafter the Department [State of California] and its contractors shall have the right, at their convenience, to operate railroad equipment within that portion of the proposed interchange beyond the clearance point of the turnout located at Mile Post 210.38 [This is a new mile post number on the new relocated track different from the mile post numbers set forth in the old main line as given to the I.C.C. on page 4 of W.P.'s application to the I.C.C., Pl.'s Exh. 12, R. 74, 75, supra. Mile Post 210.77 on the old W.P. main line was at the dam site, as shown by said application to the I.C.C.] on the relocated line for the purpose of receiving railroad cars from and delivering railroad cars to Railroad Company." [Railroad Company means W.P.R.R. Co.]

Said Supplemental Contract between the State of California and Western Pacific Railroad Company, dated August 10, 1962, further specifically provided that the Common Carrier Service contracted for by the State of California for itself and others, if such service was provided by Oro Dam Constructors' railroad operation (Oro Dam Constructors had 120 days following July 30, 1962, the day the contract to build the Dam was executed in which to elect under Section 14, pages 40 and 41 of that contract, to use this part of Western Pacific's main line between Mile Post 207.08 and the Dam site Mile Post 210.77 as measured on the old main line of Western Pacific) and not by the Western

Pacific Railroad Company -- which was the fact -- then and in that event, said service was subject also to the following condition, beginning at the bottom of page 4 therein:

"... and provided further that such exclusive right to furnish common carrier railroad services shall not change the current practise regarding the interchange of common carrier freight between railroads."

The contract to build the Oroville Dam reserved the right to Common Carrier Service by railroad for the State of California and all others supplying materials for its construction, but in the event the Oro Dam Constructors elected to "use these railroad facilities (of Western Pacific Railroad), the Contractor shall make provisions for the movement of this freight from the interchange tract (Zephyr siding) to the power plant access tunnel (Oroville Dam). This movement will be limited to not more than one train per day schedules to suit the Contractors convenience." (Specifications Proposal and Contract for Construction of Oroville Dam, Pl.'s Exh. 4, R. 41, page 50.)

These are the facilities which were and still remain Western Pacific's right-of-way between the interchange or Zephyr siding and the Dam site.

While Oro Dam Constructors performed the contract to build the Dam for California according to specifications, including the movement of interstate freight between Zephyr siding and the Dam, all of Western Pacific's common carrier activities were limited to movements

between its relocated line and Zephyr siding. Had Oro Dam Constructors failed to perform this contract even though all bills of lading and freight bills as shown by Western Pacific Railroad Company's demurrage records for 1964 and 1965 (Pl.'s Exh. 8, R. 59, 60, 68) designated Zephyr siding as the destination for all interstate movements of freight moved by Western Pacific, then it would have been Western Pacific's exclusive obligation under Federal law as well as its contracts with the State of California (Pl.'s Exh. 2, R. 33, 34) to continue the interstate Common Carrier Service at the Oroville Dam site and from that point to Zephyr siding.

(6) PUBLISHED TARIFFS FOR MOVING RAIL FREIGHT BETWEEN OROVILLE AND OROVILLE DAM.

The published tariffs for hauling freight cars for the Dam were just as misleading as Western Pacific's freight bills were with respect to whether the interstate rail freight movement ended at Zephyr or at the Dam or, put another way, whether the protective provisions of F.E.L.A. ended at Zephyr.

Western Pacific's legal action with respect to the publishing of tariffs for freight hauling between Oroville and the Dam was not any more consistent than its practice of issuing freight bills to consignees in care of Oro Dam Constructors or at times to Oro Dam Constructors in care of consignees. Both efforts showed a dual purposes, namely, to protect the right to receive freight hauling revenue between Oroville and Oroville Dam and at the same time eliminate the protective provisions of F.E.L.A. for that part of the movements made by Oro Dam Constructors.

Defendants concede that Western Pacific never operated beyond Zephyr (R. 13, lines 3-19).

On April 24, 1963, the first freight rate became effective between Oroville and Zephyr, California (Pl.'s Exh. 9, R. 61, 68), $40.00 per car and $50.00 per car, depending on the type of freight shipped.

"When the charge was first published, the charge was restricted to apply only in connection with shipments which moved to the spur track of the State of California." (R. 62, lines 5-8.)

Subsequently, under Pacific Southcoast Freight Bureau proposal 8877 (Pl.'s Exh. 10, R. 66,68, dated March 6, 1963), which again (noted under "Further Action" and some later proposal number) was notice of independent action by Western Pacific, charges were added of $50.00 and $60.00 per car which would apply on traffic movements over the spur track of California out of Zephyr, from Zephyr to the Oroville Dam (R. 62, lines 9-16). Said spur track is Western Pacific's right-of-way between Zephyr and the Dam. Western Pacific Railroad collected tariffs for interstate rail freight car movements made by Oro Dam Constructors.

At page 22 of Pl.'s Exh. 1, R. 22, 27 (Contract of July 28, 1957 to Relocate Western Pacific right of way) is the following:

"The existing siding of the Railroad Company Station at Oroville shall be extended a distance of approximately 2,500 feet from the beginning of the relo-

cation at Oroville to a point Easterly thereof along the route of the relocation." Easterly is upstream toward the Dam site and the beginning of Zephyr siding is in the freight yard of Western Pacific in the City of Oroville. All the tariffs listed in Pl.'s Exh. 9, R. 61, 68, should apply only to freight cars hauled by Oro Dam Constructors, since the beginning of Zephyr is in the Western Pacific's Station at Oroville.

The fifth revised page (of Pl.'s Exh. 9, R. 61, 68) of Tariff 300, effective July 17, 1963, added $50.00 and $60.00 charges per car and 5-1/2 cents per 100 pounds for weight in excess of 90,000 pounds per car to apply in connection with the traffic moved from Zephyr to Oroville Dam by Oro Dam Constructors (R. 63, line 24 to R. 64, line 8). Footnote (e) preceding the $50.00 and $60.00 car charges on said fifth revised page reads: "e -- Applies only on traffic for movement over spur track of the State of California (subject to note 2)" -- indicates that $10.00 per car of the $50.00 and $60.00 charges allowed was payment to Western Pacific for Oro Dam Constructors' movement of said cars between Zephyr and Oroville Dam.

The sixth revised page made applicable the same rate in the fifth revised rate page immediately supra to intrastate traffic on June 29, 1963. The effective date on interstate traffic remained July 24, 1963 (R. 64, lines 9-18).

The seventh revised page added a rate per car from Zephyr to Oroville City (R. 64, lines 19-22).

The "NOTICE OF INDEPENDENT ACTION 24" (Pl.'s Exh. 11, R. 66, 64) under caption Pro 9335, circulated on behalf of Western Pacific through Pacific Southcoast Freight Bureau (R. 70, lines 22-25), provided for rates of $50.00 and $60.00 per car from Oroville to Zephyr, which rates would apply on traffic for movement from Zephyr to Oroville Dam (R. 72, lines 1-5).

(7) IN RECOGNITION OF FEDERAL CONTROL OF ORO DAM CONSTRUCTORS' FREIGHT MOVEMENTS IS WESTERN PACIFIC RAILROAD CO.'S ACTION BEFORE THE INTERSTATE COMMERCE COMMISSION TO WITHHOLD SAID MOVEMENTS.

Under date of June 11, 1963, five or more months after Oro Dam Constructors began providing all Common Carrier Service at the Dam, Pl.'s Exh. 11, R. 68, 74, discloses Western Pacific Railroad Company's action to establish approved Interstate Commerce Commission rates for freight movements over its old main line from the interchange to the Dam site within less than the statutory period of time or on one day's notice, using as justification for said action the following as set forth therein:

"Effective April 24, 1963 the Western Pacific Railroad published charges of $40.00 and $50.00 per car to apply on freight as described Item 7490, my I.C.C. No. 1439, from Oroville, Calif. to Zephyr, Calif. These charges applied on movements to Western Pacific's connection with the spur track of the State of California to cover the movement of traffic for the Oroville Dam project. Under contract between the State of California and Western Pacific the latter has the right to provide service over spur track referred to. Since

rail connection between the Western Pacific and said spur track has just been completed and since tonnage for the Oroville Dam is currently moving it is the desire of the contractors to immediately use proposed service and charges applicable over said spur track so that delivery can be made to the dam site. Lacking immediate use of proposed service and charges shipments will be required to be held in contractor's yard at Oroville thus causing needless delay in construction program."

(8) WESTERN PACIFIC RAILROAD BY CONTRACT HAD THE RIGHT TO CONTROL ORO DAM CONSTRUCTORS' RAILROAD OPERATION IN ITS MOVEMENTS OVER WESTERN PACIFIC RAILROAD CO.'S RIGHT-OF-WAY BETWEEN ZEPHYR AND OROVILLE DAM.

The Contract form of October 26, 1962 Contract, Pl.'s Exh. 6, R. 28, 49, 53, following the word "WITNESSETH:", except for the underlined insertions in the 1st and 3rd paragraphs therein, was attached and marked Exhibit "C" to the Contract of June 28, 1957, Pl.'s Exh. 1, R. 22-27, executed between the State of California and Western Pacific Railroad Company, and also a verbatim copy of the same is inserted as APPENDIX 1 at pages 214 and 215 of the Contract to build the Dam, Pl.'s Exh. 4, R. 41.

Paragraphs numbered 5 and 6 of said Contract dated October 26, 1962, provide:

"5. Contractor hereby agrees to indemnify Railroad against and save it harmless from any and all claims, demands, costs, loss, damage, injury or liability howsoever same may be caused, resulting

directly or indirectly from the performance of any or all of the work to be done by Contractor on the premises of Railroad alongside of, under and above the tracks of Railroad by virtue of this agreement or by virtue of said agreement between the Department and Contractor, or by the presence of any person on the premises of or on or about the tracks of Railroad by virtue of this agreement or said agreement between the Department and Contractor." (The agreement between Department and Contractor is the contract to build the Dam, Pl.'s Exh. 4, R. 41.)

"6. Contractor shall comply with the rules and regulations of Railroad or the instructions of its representatives in relation to the proper manner of protecting the tracks and property of Railroad and the traffic moving on such tracks, as well as the wires, signals and other property of Railroad, its tenants or licensees at and in the vicinity of the work during the period of construction. Contractor, subject to the supervision and control of Railroad's Chief Engineer or other designated officer, shall perform Contractor's work in such manner and at such times so that said work shall not endanger or interfere with the safe operations of the tracks and property of Railroad and the traffic moving on such tracks, as well as wires, signals and other property of Railroad, its tenants or licensees at or in the vicinity of the work."

(9) AN INSURANCE POLICY PROTECTING WESTERN PACIFIC RAILROAD COMPANY'S CONTINUING DUTY TO PROVIDE COMMON CARRIER SERVICE AT THE DAM FOR THE STATE OF CALIFORNIA AND OTHERS SHOULD ORO DAM CONSTRUCTORS' COMMON CARRIER SERVICE BE DISRUPTED.

The Use and Occupancy Policy, No. RR 2008, issued by Fireman's Fund Insurance Company, Pl.'s Exh. 17, R. 17, is provided for Western Pacific Railroad Company's protection pursuant to the agreement dated October 26, 1962.

Said insurance policy insures Western Pacific Railroad Company "... against business interruption as described herein."

"1. ... arising out of or connected with the operations of Oro Dam Constructors ... on or adjacent to the properties of the named insured on or near the construction sites of ... Oroville Dam, ...

"2. Payment Rate: If, ... the named insured is unable to use the track, roadbed or other operating facilities for the movement of trains, the company shall be liable at the rate of $1,041.67 for each hour or fraction thereof during the period of such suspension of use.

"3. The length of time of interruption of business for which loss may be claimed:

(a) shall commence at the time the first train is detoured over an alternate route because of an insured loss and shall cease at such time as the insured's operating facilities become usable

(b) shall not exceed such length of time as would be required with the exercise of due diligence and dispatch to rebuild or repair or replace such

described property as has been damaged or destroyed

(c) shall not exceed $500,000 in the aggregate during the term of this policy

"4. Resumption of Operations: It is a condition of this insurance that if the insured could reduce the loss resulting from the interruption of business by complete or partial resumption of operations of the operating facilities described, whether damaged or not, such reduction shall be taken into account in arriving at the amount of loss hereunder.

"5. Expense to Reduce Loss: This policy covers such expenses as are necessarily incurred for the purpose of reducing any loss under this policy not exceeding, however, the amount by which the loss hereunder is thereby reduced.

"6. Other Insurance: ...

"7. Loss Clause: ...

"8. Breach of Warranty Clause: ...

"CONDITIONS

"1. Carriers Clause. It is understood and agreed that the insured may accept without prejudice to this insurance the ordinary bills of lading or receipts issued by any carrier or other bailee, but it is agreed by the insured that this insurance shall not enure directly or indirectly to the benefit of the carrier or other bailee, by stipulation in bill of lading or otherwise, and in case of any

agreement or act, past or future, by the insured whereby any right of recovery of the insured, against any persons or corporations is released, lost or prejudiced, which would except for such agreement or act, pass to this company upon acceptance of abandonment or payment of loss, then this company shall not be bound to pay such loss, or to make any advance whatsoever to the insured by reason thereof.

"It is agreed by the insured that he has not and will not enter in any special agreement with any carrier, or bailee releasing them from their common law or statutory liability.

"2. Notice and Proof of Loss.
...

"3. Examination under Oath.
...

"4. Settlement of Claims. All adjusted claims shall be paid or made good to the insured within sixty (60) days after presentation and acceptance of satisfactory proof of interest and loss at the office of this company.

"No loss shall be paid hereunder if the insured has collected the same from others.

"5. Subrogation. In the event of any payment under this policy the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to

prejudice such rights.

"6. Suit. ...

"7. Appraisal. ...

"8. Cancellation. ...

"9. Premium. The payment of premium shall be the duty of Oro Dam Constructors and in no event shall payment of premium be an obligation of the named insured."

(10) AN INSURANCE POLICY COVERING WESTERN PACIFIC'S RISK OF PAYING AN OBLIGATION UNDER LAW TO AN INJURED EMPLOYEE OF ORO DAM CONSTRUCTORS, BUT RESTRICTED TO SUCH RIGHTS AS SUCH EMPLOYEE MAY HAVE UNDER THE F.E.L.A. AS AGAINST WESTERN PACIFIC; FREIGHT CAR DAMAGE OR LOSS AND FREIGHT DAMAGE OR LOSS WHILE IN THE POSSESSION OF ORO DAM CONSTRUCTORS.

The Bodily Injury Liability Policy, No. RR 2001, covered damages arising from Joe Pickney's death under the Federal Employer's Liability Act, for the benefit of Western Pacific Railroad Co., Pl.'s Exh. 18, R. 96. The first page of said exhibit in Item 2 incorrectly gives the policy period as "From September 26, 1962 To September 26, 1963." The correct Policy Period appears on the Final Page entitled "Declarations" in "Item 2. Policy Period: From September 26, 1962 To November 15, 1967 ... at the designated job sites as stated herein."

The covering provisions are for Bodily Injury Liability.

1. "To pay on behalf of the

insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury ..., including death at any time resulting therefrom, hereinafter called 'bodily injury', either (1) sustained by any person arising out of acts or omissions at the designated job site which are related to or are in connection with the work described in Item 6 of the declarations, or (2) sustained at the designated job site by the contractor or any employee of the contractor or by any designated employee of the insured whether or not arising out of such acts or omissions." (The words "designated employee" as defined in Subsection (c) of Definitions of said policy includes those employees of Western Pacific who may from time to time be on the job site inspecting Oro Dam Constructors' railroad operation or other operations affecting said railroad operation, pursuant to numbered paragraphs 2, 3 and 6 of the contract between Western Pacific Railroad Co. and Oro Dam Constructors executed October 26, 1962, Pl.'s Exh. 6, R. 28, 53.)

This policy does not apply ("EXCLUSIONS", page 3 therein):

"(e) under Coverage A, to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law; provided that the Federal Employers' Liability Act, U.S. Code (1946) Title 45, Sections 51-60, as amended, shall for the purposes of this insurance be deemed not to be any similar law;".

"(a) to liability assumed by the insured under any contract or agreement

except a contract as defined herein;".

Under Subsection (d) of
II. Definitions --

"Contract - The word 'contract' means any contract or agreement to carry ... property for a consideration ..., trust of interchange contract or agreement respecting motive power, rolling stock or ..."

(The contract to build the Dam was such a contract as defined herein since it made provision for Oro Dam Constructors to collect for the freight it hauled for others, at page 50 of said contract, the last paragraph of Section 17, Pl.'s Exh. 4, R. 41.)

The contract between the State of California and Western Pacific Railroad dated August 10, 1962, Pl.'s Exh. 2, R. 33, 34, was also one of the defined contracts allowing for the assumption of liability without coming within said exclusionary provisions of subsection (a) since it was an agreement of trust of interchange contract of railroad freight or agreement respecting motive power, rolling stock at the interchange track.

There are listed 19 conditions in said policy to the insured company's liability thereon.

Condition number --

"12. No Benefit to Bailee [Relating to Coverage C or 3rd party property damage claims]

"The insurance afforded

by this policy shall not enure directly or indirectly to the benefit of any carrier or bailee, other than the named insured, liable for loss to the property."

Condition number --

"13. Subrogation. In the event of any payment under this policy, the company shall be obligated [subrogated] to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights."

The second paragraph of Condition No. 1 of the Insurance Company's "Use and Occupancy Policy", Pl.'s Exh. 17, R. 96, supra, is as follows:

"It is agreed by the insured that he has not and will not enter in any special agreement with any carrier or bailee releasing them from their common law or statutory liability."

Said Liability Policy in addition to protecting Western Pacific from claims of Oro Dam Constructors' employees under the Federal Employer's Liability Act, as well as its own employees, assigned to supervise or work on the Oro Dam Constructors' railroad under coverage A (Bodily Injury Liability) of paragraph No. 1, also

Under coverage B (Property Damage Liability) agrees:

"To pay on behalf of the insured all sums which the insured shall become

legally obligated to pay as damages because of physical injury to or destruction of property, including the loss of use of any property due to such injury or destruction, ... arising out of acts or omissions at the designated job site which are related to or are in connection with the work described in Item 6 of the declarations." This coverage should relate to freight cars and shipments in them while Oro Dam Constructors had possession of freight cars left or picked up at Zephyr.

Under coverage C (Physical Damage to Property) the insurer agrees:

"To pay for direct and accidental loss or damage to rolling stock and their contents, mechanical construction equipment, hereinafter called loss, arising out of acts or omissions at the designated job site which are related to or are in connection with the work described in Item 6 of the declarations; provided such property is owned by the named insured or is leased or entrusted to the named insured under a lease or trust agreement."

This should cover the same losses that might occur under coverage B except that Western Pacific itself could collect for such a loss or damage to a freight car or its contents while Oro Dam Constructors had possession of it.

It should be here noted that at some later date the seven individual corporations and R. B. Potashnick, making up the joint venture of Oro Dam Constructors, as listed in the endorsement of said policy, Pl.'s Exh. 18, R. 96, also became named insureds in said policy, since the blank spaces at the bottom of said endorse-

ment had been completed as an endorsement not attached to the policy when it was first issued.

(11) JURISDICTION IS UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT, 45 U.S.C. 51 ET SEQ., AS SET FORTH ABOVE UNDER (d).

(h) A DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THIS WRIT.

All the contracts in this action, omitting Western Pacific's freight car bills, Pl.'s Exh. 8, R. 59, 68, point to the contract right of the State of California to have common carrier railroad freight service at the Oroville Dam during the construction of said Dam and related projects.

There was no other purpose in constructing Zephyr siding. No one else could be served other than the contract suppliers for the State of California and other contractors.

Zephyr siding (beginning in Western Pacific's station at Oroville) was the point where Western Pacific's movements ended as long as Oro Dam Constructors continued freight car movements beyond Zephyr siding.

Oro Dam Constructors' movements of interstate car shipments to and from the Dam end of said siding cannot be any less an interstate freight movement than Western Pacific's movements for the same cars to and from Western Pacific's Oroville station end of said siding.

1. WESTERN PACIFIC FREIGHT BILLS TO ZEPHYR TO RESTRICT F.E.L.A. PROECTION.

Western Pacific's freight car bills designating Zephyr as the destination of freight car movements was incidental to the contract to build the Dam and provide common carrier service at the Dam. The interchange of freight cars between Western Pacific and Oro Dam Constructors was in accordance with the contract executed on August 10, 1962, between Western Pacific and the State of California, Pl.'s Exh. 2, R. 33, 34, and the common carrier service furnished by Oro Dam Constructors shall not change "... the current practise regarding the interchange of common carrier freight between railroads."

It just so happened that each of Western Pacific's freight bills, Pl.'s Exh. 8, R. 59, 68, included all freight within a freight car; also, it just so happened that all published tariffs between Oroville and Zephyr and between Zephyr and Oroville Dam relate only to loaded freight car movements, Pl.'s Exh. 9, R. 61, 68. Nothing in either of said Exhibits defeats the August 10, 1962 agreement, supra, respecting the interchange of car load common carrier freight between railroads.

Erie R. Co. v. Shuart, et al. (1919), 39 Sup. Ct. 519, 250 U.S. 465, holding: While freight remains in a freight car in interstate transit, even though in the possession of the consignees, it remains subject to the railroad's common carrier's responsibilities.

Though a car containing an interstate shipment of horses had arrived

at its destination, and the consignees were proceeding to unload the animals through a cattle chute owned and operated by the carrier, the transportation was not complete, and, where the horses were injured when other cars were pushed against the one being unloaded, written claim of loss, made a condition to liability in the bill of lading, must be given in order to support recovery against the carrier.

Except for the fact that Zephyr was the end of Western Pacific's freight car movements during the time Oro Dam Constructors moved freight cars to the Dam, there was no reason for Western Pacific to designate Zephyr as the destination of such freight in its 79 freight car bills included in Pl.'s Exh. 8, R. 59, 68, other than to restrict the protective provisions of the Federal Employer's Liability Act.

The plan to have all contract suppliers for Oroville Dam ship freight to and from the Dam by way of using Zephyr siding as the shipping point instead of the Dam was an attempt under 45 U.S.C. 55 to exempt Oro Dam Constructors and Western Pacific Railroad Co. from liability under the Federal Employer's Liability Act, 45 U.S.C. 51, in the movement of Common Carrier freight between Zephyr and the Dam.

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void ..." 45 U.S.C. 55.

Oro Dam Constructors has treated plaintiff's claim for wrongful death as a Workman's Compensation claim under

California law when as a matter of contract obligation performed, it provided Common Carrier service by railroad at the Oroville Dam site moving Common Carrier railroad freight between the Dam and Zephyr, a distance of at least 3.69 miles (not including the distance moved on Zephyr siding).

Zephyr siding, sometimes referred to as the "interchange tracks" or California spur, connects Western Pacific's old main line right of way with its new main line right of way about 3.69 miles downstream from the Dam. (Zephyr siding parallels the relocated line as it moves east toward the Dam out of Western Pacific Railroad Co.'s Oroville station.)

The west entrance to Tunnel 4 where the head-on collision occurred killing Pickney and three others, was upstream from Zephyr, a few hundred yards between Zephyr and the Oroville Dam on the old Western Pacific main line right-of-way, a line of track under the jurisdiction of the Interstate Commerce Commission as a part of the Western Pacific Railroad Co.'s interstate line.

The largest individual consignee of the 74 interstate freight shipments included in Western Pacific's freight bills, Pl.'s Exh. 8, R. 59, 68, to Oroville Dam by way of continued movement from Zephyr was McDowell Wellman, at times designated on said freight car bills as McDowell Wellman Engineering Co. This company was not one of the seven corporations and one individual that made up the Joint Venture of Oro Dam Constructors with a contractor's License No. 210-670, whose exact legal names are listed on pages 192

and 194 of the contract to build the Dam, Pl.'s Exh. 4, R. 41.

Of the 27 out-of-State cars McDowell Wellman received from Oro Dam Constructors 7 were consigned to said company in care of Oro Dam Constructors. Also, 3 of the 8 cars consigned to Peterson Tractor, not a member of the Joint Venture, sometimes designated Peterson Tractor and Equipment Co. on Western Pacific's freight bills, were shipped to Peterson Tractor in care of Oro Dam Constructors.

It is of note what whatever Western Pacific's original plan was for issuing freight bills for car loads of freight to consignees at Zephyr, it did at times issue bills to individual consignees and at other times to such consignees in care of Oro Dam Constructors or to Oro Dam Constructors in care of individual consignees. There was not a uniformity of practice on the part of Western Pacific in making out those car load freight bills. However, the freight bills which indicated the car load shipments were in care of another person or corporation was to the extent of such indications an admission that consignments of freight generally were not planned to be delivered to said consignee by Western Pacific except through Oro Dam Constructors.

Oro Dam Constructors' contract obligation with the State of California, Pl.'s Exh. 4, R. 41, at page 50, also required it to move not more than one train per day of railroad freight over Western Pacific's right of way between Zephyr and the Dam.

2. TARIFFS PROVIDING REVENUE TO WESTERN PACIFIC FOR ORO DAM CONSTRUCTORS' FREIGHT HAULS.

Western Pacific Railroad Company's double purpose in issuing tariffs (Pl.'s Exh. 9, R. 61, 68) covering interstate freight car movements between Oroville and Oroville Dam is perhaps clearer than its freight bills (Pl.'s Exh. 8, R. 59, 68) to Zephyr. (Purpose to provide freight revenue to Western Pacific for car movements made by Oro Dam Constructors yet restrict protective provisions of F.E.L.A. to Western Pacific Railroad's movements to Zephyr.)

In Western Pacific Railroad Co.'s "Consolidated Application for Abandonment, Construction and Trackage Rights" before the Interstate Commerce Commission (on page 4 of Pl.'s Exh. 12, R. 74, 75) is the following:

"From a point at or near M.P. 205.47 at or near Oroville, California, to a point at or near M.P. 232.43 at or near Intake, California.

"The total length of the line proposed to be abandoned is approximately 26.96 miles, more or less, all located in the County of Butte, State of California. However, although it is to be abandoned as main line track hereunder, that portion of line between M.P. 207.08 and M.P. 210.77 will be retained in place, connected to the line proposed to be acquired and operated by applicant as a spur track or branch line serving the dam site.

"(d) Applicant seeks authority to abandon both the line and its

operation, with the exception, however, of the operation of the portion retained as a spur or branch as noted next above."

It seems clear that Western Pacific's single line of track to be abandoned yet retained in use as a spur track to serve the Dam began at Oroville near its old line mile post marker 205.47.

The Interstate Commerce Commision was fully informed that Zephyr, aside from being the name of one of Western Pacific Railroad Co.'s interstate passenger trains, was the name of this siding beginning at the City of Oroville, and was an alter ego for Oroville Dam for freight shipments to the Dam location. $50.00 and $60.00 per interstate car movement to a siding beginning in Oroville, without loading and unloading, could not, it is submitted, be a reasonable tariff for such movements by Western Pacific.

Western Pacific Notice of Independent Action 24 (Pl.'s Exh. 11, R. 68, 74) before the Interstate Commerce Commission spells out specifically that --

From Oroville
To Zephyr
the $50.00 and $60.00 car movements
"Applies only on traffic for movement over spur track of the State of California (subject to Note 2)". Note 2 is set forth on the 3rd and following revised pages to and including the 10th revised page of tariff 300, Pl.'s Exh. 9, R. 61,68. Said Note 2 reads:

"(a) Applies only on traffic which initially moved inbound to Oroville via W.P., except:

"(b) On traffic moving in Transcontinental Freight Bureau, Agent, Tariffs will also apply on traffic which does not initially move into Oroville, by W.P."

3. INSURANCE PROTECTING WESTERN PACIFIC FOR ORO DAM CONSTRUCTORS' FREIGHT HAULS.

Had this plan of shipping to Zephyr instead of Oroville Dam so as to restrict Oro Dam Constructors' railroad employees to California Workman's Compensation failed to work, then, in that event, Western Pacific had insurance protection to cover claims of Oro Dam Constructors' railroad employees. Said protection was restricted to claims under the Federal Employer's Liability Act, Pl.'s Exh. 18, R. 96. There was an insurable interest for that type of loss or obligation on the part of Western Pacific Railroad as well as an admission on its part that jurisdiction under the F.E.L.A. existed, otherwise there would not be an insurable interest for that type of loss under the policy. If there was no jurisdiction there could be no claim presented.

Every protection to Western Pacific Railroad Co. in said policy is based on the assumption that Oro Dam Constructors was to perform all carrier functions in the movement of car freight between Zephyr and the Dam, which Western Pacific would have done had it not been for Oro Dam Constructors. It would seem that this Court's decision in the case of Sinkler v. Missouri Pacific R. (1958), 356 U.S. 326, 78 Sup. Ct. 758, 2 L. Ed. 2d 799, was the very basis for writing said insurance policy as it was written. Any

type of loss to property or injury to an employee or third persons which Oro Dam Constructors could conceivably cause as an interstate common carrier by railroad in the movemnt of railroad freight to or from Zephyr was in law the responsibility of Western Pacific Railroad Co. as premised by said insurance policy. No other loss was contemplated by the protection given Western Pacific in said policy.

If a railroad employee of Oro Dam Constructors was injured at a time when the employer was not actually engaged in interstate commerce, but during a time when said employer was generally providing that service in the place of Western Pacific, then that employee would have the protection of F.E.L.A. in an action against Oro Dam Constructors.

In the case of Kach v. Monessen Southwestern Ry. Co. (1945), 151 Fed. 2d 400, the injured fireman was by analogy employed by a company under similar circumstances to that of Pickney. Pickney was employed by Oro Dam Constructors as a diesel locomotive engineer. The employers of each man took a part with other carriers in the continuous movement of interstate railroad freight from time to time and as such, became subject to the power of Congress under the commerce clause of the Constitution even though the railroad itself did not transport freight across the state line.

Both employees at the times of their respective accidents were not engaged in moving interstate freight.

The Act of August 11, 1939 amended Section 1 of the Federal Employer's

Liability Act by adding thereto the following provision: "Any employee of a carrier, any part of whose duties as such employee shall be in the furtherance of interstate ... commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of the Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act."

In the Kach case:

"The evidence discloses that the defendant receives cars loaded with raw materials consigned to the Steel Company from the two connecting railroads and places them at the appropriate points in the works of the Steel Company. It also receives from the Steel Company cars loaded with the manufactured product of the company and moves them from the points of loading to the points of connection with the connecting railroads. The defendant however does not publish tariffs of any kind, does not issue bills of lading, its name does not appear on any of the bills of lading covering the inbound shipments received from the connecting carriers and it does not participate in any of the freight rates covering the materials transported by those railroads."

In Sinkler v. Missouri Pacific R. (1958), supra, this court holds that the term "agents" in the statute meant, "[When] a railroad employee's injury caused in whole or in part by the fault of others performing under contract, operational activities of his employer, such others are 'agents' of the employer within the meaning of Section 1 of F.E.L.A." Oro

Dam Constructors and its railroad employees were performing an operational activity for Western Pacific.

Western Pacific's "Use and Occupancy" policy, Pl.'s Exh. 17, R. 96, protected it from any loss due to interruption of common carrier railroad freight service to the Dam over its interstate line between Zephyr and the Dam.

The insurable interest protected by said policy was Western Pacific's responsibility to the Interstate Commerce Commission for the movement of interstate freight cars over said line from Zephyr to the Dam even though Oro Dam Constructors moved all of said freight pursuant to its agreement to build the Dam. Western Pacific gave up possession of said spur track to the State of California in its contract of August 10, 1962, but retained an easement for its railroad right of way to the Dam, which continued to be under the regulatory powers of the Interstate Commerce Commission. An example of that power is set forth in point 7 of (e), pages 14-15 herein, when Western Pacific on June 11, 1963 threatened to refuse movement of freight to the Oroville Dam (while Oro Dam Constructors was actually moving it) until tariff rates had been established with the Interstate Commerce Commission to cover traffic movements by Oro Dam Constructors for the Dam.

Western Pacific had the right under Federal law to authorize Oro Dam Constructors, as it did through the State of California by agreement with the State, to take and use part of Western Pacific's right of way for a dirt fill haul route and

also provide Common Carrier service over said right of way to the Dam. Said agreement with the State was the August 10, 1962 agreement, Pl.'s Exh. 2, R. 33, 34. The Interstate Commerce Commission continued to have regulatory power over interstate movements even though Oro Dam Constructors made the movements. Said movements were an operational activity of Western Pacific under the Sinkler case, supra.

Judge Frey in writing the opinion for the Ninth Circuit has said, "The evidence simply did not show that Oro Dam Constructors had ever moved freight for others over the track in question." This is equivalent to saying that the formal contracts made for common carrier railroad service at the Oroville Dam beginning in 1957, Pl.'s Exh. 1, R. 22, 27, the transfer by contract of August 10, 1962, Pl.'s Exh. 2, R. 33, 34, from Western Pacific to Oro Dam Constructors of that obligation to provide such service to the Dam, Western Pacific's insurance policy protecting it from claims of injured employees of Oro Dam Constructors under F.E.L.A. with coverage beginning on September 26, 1962, Pl.'s Exh. 18, R. 96, the Interstate Commerce Commission order approving the continued use of the California spur track (from Zephyr to the Dam) as part of Western Pacific's interstate line, Pl.'s Exh. 14, R. 75, the published tariffs filed with the Interstate Commerce Commission for freight hauling over said spur, Pl.'s Exh. 9, R. 61, 68, the insurance policy protecting Western Pacific's contingent obligation to provide said service should Oro Dam Constructors fail to do so, Pl.'s Exh. 17, R. 96, and also the risk of loss to freight cars or their contents while in the posses-

sion of Oro Dam Constructors, Pl.'s Exh. 18, R. 96, were meaningless contract obligations and the 79 freight bills, Pl.'s Exh. 8, R. 59, 68, prepared by Western Pacific from its 1964 and 1965 demurrage records restricted and ended Western Pacific's liability for the loaded freight cars and any further movement of them after Western Pacific set said cars out on Zephyr siding.

4. CONCLUSION.

All of the evidence presented by plaintiff-appellant in support of jurisdiction for the death loss under the F.E.L.A. are legal conclusions, the legal interpretation of contracts, the legal meanings of Western Pacific Co.'s actions before the Interstate Commerce Commission as well as Oro Dam Constructors' admissions as to the movement of all rail freight left at Zephyr before and following the date of the accident killing Pickney on October 7, 1965. There can be no issue as to what the legal meaning of this evidence is. There is no issue of fact on the evidence presented by plaintiff.

Under the holding of the Erie R. Co. case, supra, it would be necessary to say that the 74 freight bills covering Western Pacific's billing for interstate car movements for cars it left at Zephyr were not interstate movements but rather that the interstate movement had ended at Oroville City and that the freight car movements beyond that City by public or private arrangement between the State of California, Oro Dam Constructors, Western Pacific and the consignees of freight represented by said freight bills, were private hauls instead of common carrier

hauls, since the movement of car freight from one end of the siding could not, by reason of said freight bills, be different from the movement of the same loaded car from the other end of said siding.

The basis for this petition is that the judgment below decided a federal question in a way in conflict with the applicable decisions of this Court, in the Erie case and the Sinkler case, supra.

It is respectfully urged that Joe Pickney, a diesel locomotive engineer employed by Oro Dam Constructors, performed an operational activity with his employer for Western Pacific Railroad Company, and he had the protection of the Federal Employer's Liability Act at the time of his death in this action against Oro Dam Constructors and Western Pacific Railroad Company.

July 20, 1971

Respectfully submitted,

Dee B. Tanner

DEE B. TANNER
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MILDRED A. PICKNEY, Personal Representative of Joe Pickney, Deceased, Plaintiff-Appellant, vs. ORO DAM CONSTRUCTORS, etc., et al., Defendants-Appellees.	No. 24,467

[April 30, 1971]

Appeal from the United States District Court for the Eastern District of California

Before: CHAMBERS and TRASK, Circuit Judges, and *FREY, District Judge

FREY, District Judge:

Appellants are here complaining of the judgment of the trial court dismissing the complaint following a preliminary hearing pursuant to Rule 12(d), Rules of Civil Procedure. The trial court dismissed on finding lack of jurisdiction of the Federal District Court.

Appellants, plaintiffs below, filed an action invoking federal jurisdiction by

*Honorable William C. Frey, United States District Judge, Tucson, Arizona, sitting by designation.

alleging a claim for wrongful death under Federal Employer's Liability Act, 45 U.S.C.A. 51. The defendants denied applicability of F.E.L.A. The purpose of the preliminary hearing was to determine the applicability of F.E.L.A. The husband-father of plaintiffs had been killed in a head-on train collision while he was operating a railroad engine pulling a trainload of earth material for defendant Oro Dam Constructors. Decedent's engine was struck by a train of empty cars which was returning from a similar haul.

There is no conflict in the evidence that decedent was employed by defendant Oro Dam Constructors, that Oro Dam Constructors was a construction combine or joint venture engaged in building Oroville Dam across the Feather River near Oroville, California, that defendant Western Pacific Railroad had no supervision or control or direction of any sort over decedent; all of the track, equipment and area involved were under the exclusive jurisdiction, supervision and control of defendant Oro Dam Constructors; and that Western Pacific never exercised any direct or indirect supervision, control or direction over any of the operations or employees of Oro Dam Constructors.

The facts relied on by appellants to substantiate their claim of jurisdiction in the Federal District Court via F.E.L.A. are that Western Pacific Railroad is and was a common carrier by railroad in interstate commerce, that the track on which the collision occurred was once a part of the Western Pacific system, that Western Pacific retained certain rights to furnish common carrier service over the track from its Zepher terminal to the dam site and

also retained certain other rights with respect to the track in question.

Plaintiffs also contend that freight cars assigned to Oro Dam Constructors and others involved in the dam construction had on occasion been moved by Oro Dam Constructors from Zepher, the Western Pacific terminal point, to the dam site. The evidence simply did not show that Oro Dam Constructors had in fact ever moved any freight for others over the track in question. However, even conceding arguendo that Oro Dam Constructors had on occasion moved freight from Zepher to the dam site, there was absolutely no evidence that it had engaged in any such activity for or on behalf of Western Pacific or as a common carrier; nor was it doing so at the time of Pickney's death.

The evidence is uncontradicted that all the track in question was abandoned by Western Pacific as an integral part of its system pursuant to a track relocation agreement which was part of the Oro Dam construction program. It is also clear that Western Pacific retained a right to furnish common carrier service over the old track to the dam site along with certain other rights. However, it is undisputed that Western Pacific had no obligation or duty to furnish such service, did not do so, and no such service was ever requested. In short, Western Pacific never exercised any of the rights which it reserved and there was no obligation to do so; no freight was ever consigned beyond Zepher and Western Pacific never delivered or directed the delivery of anything beyond Zepher. All of Western Pacific's common carrier activities terminated at Zepher.

To come within the scope of coverage under F.E L A., the following elements must be present:

(1) The employee must be employed by a common carrier by railroad, as the term used in the F.E L.A. "means one who operates a railroad as a means of carrying for the public--that is to say, a railroad company acting as a common carrier." Edwards v. Pacific Fruit Express Company, 390 U.S. 539, 541, 88 S. Ct. 1239, 1240, 20 L. Ed. 2d 112 (1968) citing Wells Fargo & Co. v. Taylor, 254 U.S. 175, 187-188, 41 S. Ct. 93, 98, 65 L. Ed. 205.

The railroad maintained and operated by the defendant Oro Dam Constructors clearly is not a common carrier based on the reasoning and test of Lone Star Steel Company v. McGee, 380 F. 2d 640 (1967), and Ciaccio v. New Orleans Public Belt Railroad, 285 F Supp. 373 (1968) and cases cited therein with facts similar to this case.

(2) The common carrier by railroad must be engaged in interstate commerce. Washington Railway & Electric Co. v. Scala, 244 U.S 630, 61 L. Ed. 1360, 37 S. Ct. 654 (1917); Philadelphia & Reading Railway Company v. Hancock, 253 U.S. 284, 64 L. Ed. 907, 40 S. Ct. 512 (1920); McCluskey v. Marysville and N. R Co., 243 U.S. 36, 61 L. Ed. 578, 37 S. Ct. 374 (1917); Bay v. Merrill & Ring Logging Co., 343 U.S. 40, 61 L. Ed. 580, 37 S. Ct. 376 (1917).

(3) An employee of a common carrier by railroad, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce, or shall in any way directly or closely and substantially affect such commerce. Southern

Pacific Company v. Gileo, 351 U.S. 493, 100 L. Ed. 1357, 76 S. Ct. 952 (1956); Reed v. Pennsylvania Railroad Company, 351 U.S. 502, 100 L. Ed. 1366, 76 S. Ct. 958.

Plaintiffs' case fails to meet any one of the tests or criteria, much less all of them.

Plaintiffs' attempts to construe the evidence in this case so as to bring it within F.E L A., must fail. The facts simply do not lend themselves to a proper conclusion of applicability of F E L.A. The trial court's findings of fact are supported by substantial evidence and will not be overturned on appeal. Zenith Radio v. Hazeltine Research, Inc., 395 U S. 100, 89 S. Ct. 1562, 23 L Ed. 2d 129 (1969); Soderham Machine Manufacturing Company v. Martin Bros. Container & Timber Products Corp., 415 F. 2d 1058 (1969), citing the Zenith case; Vessella v. United States, 405 F. 2d 599 (1969). The decedent's employer (Oro Dam Constructors) simply was not at any time engaged in any activity which could classify it as a common carrier by railroad in interstate commerce, nor was Oro Dam Constructors doing anything at the time of Pickney's death which directly or indirectly was in furtherance of interstate commerce or which in any way effected interstate commerce so as to bring this case within the scope of 45 U.S.C A., Sec. 51.

The District Court was correct in dismissing plaintiffs' action; that judgment is AFFIRMED.

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MILDRED A. PICKNEY and THOMAS E. PICKNEY, a minor, by his Guardian ad Litem, MILDRED A. PICKNEY,

Plaintiffs,

vs.

ORO DAM CONSTRUCTORS, et al,

Defendants.

No. Civ. S-410

JUDGMENT.

The above entitled cause came on for trial before the above entitled Court on the jurisdictional issues involved on April 15, 1969; Dee B. Tanner appearing as counsel for plaintiffs herein, and Claire H. Greve and Raymond A. Leonard appearing as counsel for The Western Pacific Railroad Company and Oro Dam Constructors, a joint venture consisting of Codell Construction Company, a corporation, R. P. Farnsworth & Co., Inc., a corporation, Hardaway Contracting Company, a corporation; Merritt-Chapman & Scott Corp., a corporation, McDowell Company, Inc., a corporation, Oman

Construction Company, Inc., a corporation, R. B. Potashnick, an individual, Wright Contracting Company, a corporation, and after hearing the allegations and proofs of the parties hereto and the arguments and briefs of counsel, and being fully advised in the premises, and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith.

NOW, THEREFORE, by reason of law and the findings and conclusions aforesaid, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That any action against defendants, Oro Dam Constructors, a joint venture, or Codell Construction Company, a corporation, R P. Farnsworth & Co., Inc., a corporation, Hardaway Contracting Company, a corporation, Merritt-Chapman & Scott Corp., a corporation, McDowell Company, Inc., a corporation, Oman Construction Company, Inc., a corporation, R B Potashnick, an individual, Wright Contracting Company, a corporation, by Joe Pickney, also known as Joseph F. Pickney, deceased, or any of his heirs, is barred by Section 3601 of the Labor Code of the State of California, and that their only and exclusive remedy against said defendants, Oro Dam Constructors, a joint venture, or Codell Construction Company, a corporation, R. P. Farnsworth & Co., Inc., a corporation, Hardaway Contracting Company, a corporation, Merritt-Chapman & Scott Corp., a corporation, McDowell Company, Inc., a corporation, Oman Construction Company, Inc., a corporation, R. B. Potashnick, an individual, Wright Contracting Company, a corporation is before the Workmen's Compensation Appeals Board of the State of California.

2. That neither Joe Pickney, also known as Joseph F. Pickney, nor plaintiffs herein have any cause of action against the defendants, The Western Pacific Railroad Company or Oro Dam Constructors, a joint venture, or Codell Construction Company, a corporation, R. P Farnsworth & Co., Inc., a corporation, Hardaway Contracting Company, a corporation, Merritt-Chapman & Scott Corp., a corporation, McDowell Company, Inc., a corporation, Oman Construction Company, Inc., a corporation, R. B. Potashnick, an individual, and Wright Contracting Company, a corporation, under the provisions of the Federal Employers Liability Act (45 U S.C A. Section 51 et seq.).

3. That this Court is wholly without jurisdiction of the above entitled action as to defendants or any of them, and that the above entitled action and the whole thereof be and the same is hereby dismissed, and that defendants recover from plaintiffs their costs taxed herein in the sum of $_____.

Dated: April 24, 1969.

s/ M. D. Crocker
Judge

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EASTERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MILDRED A. PICKNEY and THOMAS E. PICKNEY a minor, by his Guardian ad Litem, MILDRED A. PICKNEY,	)	
Plaintiffs,	)	
vs.	)	Civil No. S-410
ORO DAM CONSTRUCTORS, etc., et al,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This is an action for damages under the Federal Employer's Liability Act (Title 45 U.S.C. §§ 51 et seq.). Plaintiffs have a similar action pending against one of the defendants, Western Pacific Railroad Company, in the Superior Court of California in and for the County of Butte. Western Pacific Railroad Company has moved for abatement or dismissal of this action pending the disposition of the prior action in the State Court.

I have examined the record, and I am inclined to agree with defendant that these actions should have been consolidated

at the outset. Unquestionably, it would have been jurisdictionally possible to do so (See: Title 45 U.S.C. § 56 and United Mine Workers v. Gibbs, 383 U.S. 715).

It is, however, equally unquestionable that plaintiffs have a right to pursue the matter in separate forums if they so choose. This is particularly true here, since the action before the State Court involves only one of the defendants in this action and recovery is there sought under state, rather than Federal, law.*

Federal law has long tolerated overlapping proceedings between Federal and State Courts. There is no general rule which requires a Federal Court to abate or dismiss proceedings within its jurisdiction merely because of a plea of a prior action pending in a State Court (See: Adams v. State of California, 176 F. Supp. 456, 459; citing Stanton v. Embry, 93 U.S. 548).

IT IS, THEREFORE, ORDERED that defendant's motion to abate or dismiss be, and the same is, hereby denied.

DATED: November 20, 1968.

SHERRILL HALBERT
UNITED STATES DISTRICT JUDGE

*Additional problems are posed by the statute of limitations, but discussion thereof is unnecessary at this time.